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BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE
APPLICATION OF CITIZENS
COMMUNICATIONS COMPANY,
AGUA FRIA DIVISION FOR (1) AN
EXTENSION OF THE AREA
COVERED BY ITS EXISTING
CERTIFICATE OF CONVENIENCE
AND NECESSITY, (2) APPROVAL OF
THE CATERPILLAR PROPERTY
WATER/WASTEWATER
AGREEMENT, (3) APPROVAL OF
THE TARIFF FOR THE WATER
FACILITIES HOOK-UP FEE, (4)
APPROVAL OF THE TARIFF FOR
GENERAL NON-POTABLE WATER
SERVICE, AND (5) APPROVAL OF
RULE NO. 12 APPLICABLE TO NON-
POTABLE WATER SERVICE

DOCKET NO. W-01032B-00-1043

**BRIEF OF INTERVENOR DMB WHITE TANK,
LLC IN SUPPORT OF APPLICATIONS**

IN THE MATTER OF THE
APPLICATION OF CITIZENS WATER
SERVICES COMPANY OF ARIZONA
FOR (1) AN EXTENSION OF THE
AREA COVERED BY ITS EXISTING
CERTIFICATE OF CONVENIENCE
AND NECESSITY FOR
WASTEWATER SERVICE, (2)
APPROVAL OF THE CATERPILLAR
PROPERTY WATER/WASTEWATER
AGREEMENT, AND (3) APPROVAL
OF THE TARIFF FOR THE
WASTEWATER FACILITIES HOOK-
UP FEE.

DOCKET NO. SW-03454A-00-1043

Arizona Corporation Commission

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TABLE OF CONTENTS

	Page
I. OVERVIEW OF DMB AND THE WHITESTONE PROJECT	1
A. Background on DMB	1
B. Background on the WhiteStone Project	2
C. Land Use Entitlement Approvals from the Town of Buckeye.....	3
D. DMB's Request for Water and Wastewater Service.....	4
II. THE COMMISSION'S AUTHORITY TO GRANT CERTIFICATES OF CONVENIENCE AND NECESSITY	5
III. REGULATION OF WATER RESOURCES WITHIN ARIZONA.....	7
A. DMB and Citizens Are Subject to Municipal Conservation Requirements.....	9
B. DMB Must Comply with Arizona's Assured Water Supply Program.....	10
IV. REGULATION OF LAND USE AND GROWTH IN ARIZONA.....	12
A. The WhiteStone Project Exemplifies Sound Urban Planning and Growth Management.....	13
V. DMB'S REQUEST FOR SERVICE IS NOT SPECULATIVE; THE NEED FOR SERVICE DICTATES THAT A CC&N EXTENSION BE GRANTED	15
VI. CONCLUSION	17

Intervenor, DMB White Tank, LLC ("DMB"), by and through its undersigned counsel, hereby submits the following brief in accordance with the Arizona Corporation Commission's ("Commission") October 5, 2001 Procedural Order.

I. OVERVIEW OF DMB AND THE WHITESTONE PROJECT.

A. Background on DMB.

Established in 1984, Scottsdale-based DMB is among the most respected real estate development firms in the nation. DMB's business practices are predicated on acquiring and developing the best properties in the marketplace and on building lasting relationships with municipalities, business partners and associates. Through years of experience and exhaustive community building research, DMB is considered a leader in the development of master-planned communities. DMB has received numerous awards for excellence. At DC Ranch in north Scottsdale, DMB has received, among other awards, the 1998 Mame award for Best Master-Planned Community, the Orchid Award in 1998 for Best Residential Development, and the Gold Nugget Award for the Best Community/Town Site Plan. Affidavit of John L. Bradley ("Bradley Affidavit"), at ¶ 3.¹

Because DMB strives to create sustainable communities, not just subdivisions, DMB communities are destined to develop and mature over decades to come. Examples of DMB's residential developments include DC Ranch in Scottsdale, Arizona (8,000 acres); Ladera Ranch in Orange County, California (4,000 acres); Power Ranch in Gilbert, Arizona (2,000 acres); Forest Highlands in Flagstaff, Arizona (500 acres); Lahontan in North Lake Tahoe, California (720 acres); and, most recently, Santaluz in San Diego, California (4,000 acres). See Bradley Affidavit, at ¶ 3.

...

...

¹ Mr. Bradley is the General Manager of DMB Associates, Inc. His affidavit is attached at Tab A.

1 **B. Background on the WhiteStone Project.**

2 DMB's current master-planned community, for which it is seeking water and wastewater
3 utility service from Citizens Communications Company, Agua Fria Division and Citizens Water
4 Services Company of America (collectively "Citizens"), is known as "WhiteStone". WhiteStone
5 is an approximately 8,800-acre master-planned community located north and south of Interstate
6 10 on the eastern side of the White Tank Mountains. WhiteStone is entirely within the municipal
7 jurisdiction of the Town of Buckeye.

8 Approximately 8,635 acres of the property served as the Caterpillar Tractor Proving
9 Grounds from the late 1940's until 1988 (the "Caterpillar Property"). See Bradley Affidavit at ¶
10 7. Caterpillar Inc. ("Caterpillar") used the property to test its earth-moving equipment, leaving
11 the property substantially and materially altered from years of equipment testing. Upon closing
12 the facility, Caterpillar donated the Proving Grounds to the Caterpillar Foundation, an Illinois not-
13 for-profit corporation (the "Foundation"). The Foundation and DMB executed a Master
14 Agreement for the sale of the property in September 1999. Additionally, in 1999, DMB acquired
15 165 acres contiguous to the south boundary of the Proving Grounds and adjacent to the future
16 traffic interchange on Interstate 10. See Bradley Affidavit ¶ 11.

17 WhiteStone is located directly in the path of growth along the I-10 corridor. As set forth
18 above, WhiteStone is situated on the eastern side of the White Tank Mountains which
19 geographically provide a natural western boundary for the Phoenix metropolitan area. At
20 approximately 13 square miles in size, WhiteStone is unique in that it is one of the largest single
21 private landholdings in Maricopa County. See Bradley Affidavit, at ¶ 9. The ownership of a
22 parcel of land of this size by one entity creates tremendous opportunities to plan for sustainable
23 growth as well as environmentally responsible growth. In sharp contrast, piecemeal development
24 of smaller parcels necessarily results in less efficient infrastructure systems, specifically including
25 utility systems, and less orderly growth patterns. Moreover, piecemeal development often leads
26 to less sensitive environmental results including a proliferation of septic system solutions for

1 wastewater and far more numerous and less efficient private wells for domestic uses.

2 **C. Land Use Entitlement Approvals from the Town of Buckeye.**

3 In November and December of 1999, the Town of Buckeye (the "Town") approved a
4 comprehensive set of land use entitlements for WhiteStone. Specifically, the Town Council
5 unanimously approved: (1) a Pre-Annexation Development Agreement recorded in the official
6 records of Maricopa County as Document No. 99-1071208; (2) a General Plan Amendment
7 (GPA99-20) designating the Property as "Planned Community"; (3) Annexation Ordinance No.
8 19-99, annexing the Property into the municipal limits of the Town; and (4) a request to rezone
9 the Property to Planned Community District (RZ99-21). See Bradley Affidavit, at ¶ 12.

10 In exercising its expressly delegated legislative authority to plan and zone for property
11 within its jurisdiction, the Development Board of the Town and the Town Council held numerous
12 public hearings on the entitlement requests for WhiteStone over the course of several months
13 prior to and including November and December 1999. See Bradley Affidavit ¶ 12. The Town's
14 actions in approving entitlements for WhiteStone are consistent with the comprehensive statutory
15 program under which municipalities are to plan for and zone properties within their respective
16 jurisdictions. A.R.S. § 9-461, 9-462.

17 The approved entitlements include a mix of commercial, employment, industrial,
18 residential and public uses carefully balanced to create a sustainable master-planned community.
19 Specifically, more than four million square feet of commercial uses are approved for WhiteStone
20 that will provide tremendous employment, retail and industrial development opportunities in the
21 region. The bulk of the commercial uses will be strategically located near the I-10 corridor and
22 within the heart of WhiteStone which is planned to include a mixed-use town center, a pedestrian-
23 oriented central shopping, dining, residential and recreational opportunities. By approving the
24 land use entitlements for WhiteStone, the Town put in place a platform from which a balanced
25 community could evolve.

26 ...

1 **D. DMB's Request for Water and Wastewater Service.**

2 As a part of the development process, DMB has requested that Citizens extend water and
3 wastewater utility service to WhiteStone. DMB has several alternatives for obtaining utility
4 service, such as forming a water improvement district, obtaining service from Buckeye, and/or
5 forming a nonprofit sewer company, none of which would be regulated by the Commission. In
6 addition, DMB could establish and capitalize a new private water and sewer utility to serve
7 WhiteStone. DMB, however, believes that obtaining service from Citizens is the most efficient
8 manner of providing utility service and in the best interest of the future residents of WhiteStone.
9 Among other things, the WhiteStone development is contiguous to the existing certificated area
10 of Citizens Agua Fria Division.² Therefore, Citizens is ideally located to provide service.

11 Furthermore, obtaining service from Citizens is consistent with the Commission's Task
12 Force recommendation to encourage the creation of large, regional water providers rather than
13 small, piecemeal providers. See Interim Report of the Arizona Corporation Commission's Water
14 Task Force, (Oct. 28, 1999) at 4 ("[B]ecause of economics of scale, larger companies are likely to
15 be more efficient. A larger company can consolidate the administrative aspects of many smaller
16 'systems' thereby significantly reducing the overall cost of service."). More recently, in
17 connection with a special open meeting on certain of the Task Force's recommendations,
18 Commissioner Jim Irvin submitted a letter discussing the use of acquisition adjustments in regard
19 to furthering the Commission's "policy goal of water industry consolidation."³ The instant
20 application is consistent with that goal.

21 Because obtaining water and wastewater utility service from Citizens is in the best interest
22 of the future residents of WhiteStone and is consistent with the Commission's policy of

23 ² Technically, Citizens does not need an order authorizing the extension of water service because
24 Citizens' existing certificated area is contiguous to the eastern boundary of WhiteStone. See
25 A.R.S. § 40-281(B); Electric District No. 2 v. Arizona Corp. Comm'n, 155 Ariz. 252, 256, 745
26 P.2d 1383, 1387 (1987) ("The statute allows APS to extend service to areas contiguous to its
certificated area if such area is not already serviced by a public service corporation.").

³ A copy of Commissioner Irvin's letter is attached at Tab B.

1 encouraging consolidation, DMB requests that the Commission grant extensions of Citizens'
2 application.

3 **II. THE COMMISSION'S AUTHORITY TO GRANT CERTIFICATES OF**
4 **CONVENIENCE AND NECESSITY.**

5 The powers of the Commission under Article 15 of the Arizona Constitution are limited
6 and do not exceed those derived from a strict reading of the Constitution and implementing
7 statutes. E.g., Arizona Pub. Serv. Co. v. Town of Paradise Valley, 125 Ariz. 447, 449, 610 P.2d
8 449, 451 (1980); Williams v. Pipe Trades Indus. Program of Arizona, 100 Ariz. 14, 17, 409 P.2d
9 720, 723 (1966); Southern Pacific Co. v. Arizona Corp. Comm'n, 98 Ariz. 339, 345, 404 P.2d
10 692, 696 (1965). Any powers over public service corporations not specifically granted to the
11 Commission by the Constitution reside with the Legislature. Town of Paradise Valley, 125 Ariz.
12 at 449, 610 P.2d at 451. Arizona Corp. Comm'n v. Pacific Greyhound Lines, 54 Ariz. 159, 176-
13 77, 94 P.2d 443, 450 (1939). Consequently, the Commission's plenary power is limited to
14 prescribing just and reasonable classifications, rates and charges of public service corporations.
15 Williams, 100 Ariz. At 19; 409 P.2d at 723. Pacific Greyhound, 54 Ariz. at 176-177, 94 P.2d at
16 450.

17 In contrast to setting rates, the power to issue certificates of convenience and necessity
18 ("CC&Ns") is not a plenary power of the Commission that is derived from Article 15 of the
19 Arizona Constitution. Tonto Creek Estates Homeowners Ass'n v. Arizona Corporation Comm'n,
20 177 Ariz. 49, 56, 864 P.2d 1081, 1088 (App. 1993). Instead, the power to issue CC&Ns has been
21 delegated to the Commission by A.R.S. §§ 40-281 and 40-282. Id., at 58, 864 P.2d at 1090
22 ("Certificates of convenience and necessity are creatures of statute and nowhere mentioned in the
23 Constitution."). Consequently, this power is subject to such restrictions as may be deemed
24 appropriate by the Legislature. Id. at 56, 864 P.2d at 1088. Furthermore, the Commission has no
25 power to grant, deny or condition CC&Ns on a basis not expressly granted by statute. See
26 Burlington Northern and Santa Fe Railway Company v. Arizona Corp. Comm'n, 198 Ariz. 604,

1 606, 12 P.3d 1208, 1210 (App. 2000). Cf. Amer. Cable Television, Inc. v. Arizona Pub. Serv.
2 Co., 143 Ariz 273, 277-278, 693 P.2d 928, 932-933 (App. 1984) (holding the Commission lacked
3 jurisdiction to regulate utility pole licenses); General Cable Corp. v. Citizens Utilities Co., 27
4 Ariz. App. 381, 385-386, 555 P.2d 350, 354-355 (1976) (the Commission lacked jurisdiction to
5 interpret terms in an electrical supply contract).

6 The Legislature has authorized the Commission to grant, deny or condition a CC&N as "it
7 deems that the public convenience and necessity require." A.R.S. § 40-282(C). Arizona courts
8 have concluded that the Commission's authority is controlled by the public interest. Arizona
9 Corp. Comm'n v. Arizona Water Co., 111 Ariz. 74, 76, 523 P.2d 505, 507 (1974); Arizona Corp.
10 Comm'n v. Tucson Ins. and Bonding, 3 Ariz. App. 458, 463, 415 P.2d 472, 477 (App. 1966).
11 When an application for an extension of a CC&N is made, the public interest is determined by
12 comparing the capabilities and qualifications of competitors vying for the right to provide the
13 service. James P. Paul Water Co. v. Arizona Corp. Comm'n, 137 Ariz. 426, 430, 671 P.2d
14 404,408 (1983). The Arizona Supreme Court has stated that this determination must focus on
15 whether the applicant has an adequate source of water, the location of facilities in the area of the
16 extension and the amount of time and cost of installing facilities. Arizona Water Co., 111 Ariz. at
17 76-77, 523 P.2d at 507-508.

18 Even when there are no competing service providers (as in this case), the Commission's
19 decision is governed by the same statutory criteria, i.e., whether utility service is needed and
20 whether the provider is fit and proper to provide the utility service. Therefore, the Commission
21 may consider whether Citizens has or will have adequate facilities to serve WhiteStone, whether
22 an adequate water supply exists, the location of existing facilities in the area, the impact of
23 Citizens' service on existing and future customers, and other matters related to Citizens'
24 provision of utility service. As stated in the Administrative Law Judge's September 19, 2001,
25 recommended Opinion and Order, the evidence clearly demonstrates that Citizens is a fit and
26 proper entity to provide water and wastewater utility service to the WhiteStone development. See

1 Conclusion of Law ¶ 5.

2 The Commission's decision that Citizens is a fit and proper entity to provide water and
3 wastewater utility service warrants the extension of Citizens' CC&Ns without further
4 consideration. Topics such as water conservation and local land use planning are not appropriate
5 subjects for consideration by the Commission. As discussed below, these issues are already
6 regulated by the bodies to which the Legislature has delegated authority. Therefore, the
7 Commission's consideration of these issues is improper.

8 **III. REGULATION OF WATER RESOURCES WITHIN ARIZONA.**

9 Although the Commission may consider issues such as whether an applicant for a CC&N
10 has a sufficient supply of water, it is beyond the Commission's jurisdiction to consider the source
11 of Citizens' water supply or the propriety of the customers' use thereof. This is a matter within
12 the purview of the Arizona Department of Water Resources ("ADWR"). Additionally, the
13 Commission's attempt to regulate water resources interferes with the comprehensive plan for
14 water management developed by the Legislature.

15 The regulation and enactment of appropriate laws for the use and management of water,
16 and determining appropriate changes to existing law to accommodate conflicting interests in
17 water "are peculiarly legislative functions." In re General Adjudication of All Rights to Use
18 Water in the Gila River System and Source, 198 Ariz. 330, 343, 9 P.3d 1069, 1082 (2000), cert.
19 denied 121 S. Ct. 2576 (2001). Accordingly, in response to concerns over significant depletions
20 of the State's groundwater resources, the Arizona Legislature adopted the Groundwater
21 Management Act of 1980, A.R.S. § 45-401 – 704, (the "Groundwater Code").

22 The Groundwater Code is "markedly comprehensive legislation." City of Prescott v.
23 Town of Chino Valley, 163 Ariz. 608, 616, 790 P.2d 263, 271 (App. 1989). In fact, it "may well
24 be the most ambitious legislation ever enacted by the Arizona Legislature and the most
25 comprehensive water code in the United States." Cortaro Water Users' Ass'n v. Steiner, 148
26 Ariz. 343, 345, 714 P.2d 836, 838 (App. 1985). It was enacted to conserve, protect and allocate

1 the use of the State's groundwater resources and to provide a framework for the comprehensive
2 management and regulation of the withdrawal, transportation, use, conservation and conveyance
3 of rights to use groundwater in Arizona. A.R.S. § 45-401(B); See also Arizona Mun. Water Users
4 Ass'n v. Arizona Dep't of Water Resources, 181 Ariz. 136, 137, 888 P.2d 1323, 1324 (App.
5 1994); Aikins v. Dep't of Water Resources, 154 Ariz. 437, 438, 743 P.2d 946, 947 (App. 1987).

6 The Groundwater Code created ADWR, and vested that agency with jurisdiction to
7 manage the State's groundwater (and other water) resources. See generally, A.R.S. § § 45-101-
8 116. The Director of ADWR has "general control and supervision" over groundwater to the
9 extent provided in the Groundwater Code. A.R.S. § 45-103(B). No other entity, including the
10 Commission, is vested with authority to manage this important resource. Even before adoption of
11 the Groundwater Code, the Arizona Supreme Court held that issues relating to groundwater rights
12 were beyond the Commission's jurisdiction. Gamet v. Glenn, 104 Ariz. 489, 491, 455 P.2d 967,
13 968 (1969).

14 To achieve its intended purpose, the Groundwater Code instituted a program for the
15 statewide administration of groundwater with an intensive regulatory focus on four⁴ Active
16 Management Areas ("AMA"). Within these areas, where groundwater overdraft was considered
17 the most severe, the Groundwater Code provided for strict regulation of groundwater use. See,
18 e.g., Seven Springs Ranch v. State ex. Rel. Arizona Dep't of Water Resources, 156 Ariz. 471,
19 476, 753 P.2d 161, 166 (App. 1987). The Groundwater Code, for example, implemented specific
20 management goals in the AMAs⁵ and required ADWR to establish increasingly aggressive
21 conservation requirements for water users in those AMAs to help the State achieve its goals.

22 ⁴ These included the Phoenix, Tucson, Prescott and Pinal AMAs. A fifth AMA, the Santa Cruz
23 AMA, was subsequently added in 1994.

24 ⁵ For instance, in the Phoenix AMA, the Groundwater Code establishes a management goal of
25 "safe yield" - a balance between the amount of underground water pumped out of the aquifers and
26 the amount naturally and artificially recharged - by January 1, 2025. A.R.S. § 562(A); See also
Home Builders Ass'n v. City of Scottsdale, 187 Ariz. 479, 480, 930 P.2d 933, 934 (1997), cert.
denied 521 U.S. 1120 (1997).

1 ADWR complies with this particular mandate by issuing management plans pursuant to A.R.S.
2 § 45-563. The management plan currently in effect for most sectors in the Phoenix AMA⁶
3 imposes conservation requirements on municipal and industrial water users in the AMA. See
4 Third Management Plan for the Phoenix Active Management Area, 2000-2010, adopted
5 December 13, 1999 ("TMP"), Chapters 5 and 6.

6 In addition, the Groundwater Code authorizes ADWR to regulate new development in the
7 AMAs by requiring a developer to show that it can meet the long-term water demands its project
8 creates. The Assured Water Supply Program ("AWS Program") is designed to: 1) sustain
9 groundwater supplies within each AMA; and 2) to ensure that people purchasing or leasing
10 subdivided land in an AMA have a water supply of adequate quality and quantity. Accordingly,
11 anyone in an AMA who offers to sell or lease subdivided land must demonstrate the existence of
12 an assured supply of water for 100 years before the land may be marketed to the public. A.R.S.
13 § 45-576(A).

14 **A. DMB and Citizens Are Subject to Municipal Conservation Requirements.**

15 The Groundwater Code allows municipalities and private water companies in AMAs to
16 withdraw groundwater from within their service areas⁷ to serve their customers. A.R.S. § 45-491;
17 See also Arizona Water Co. v. Dep't of Water Resources, 160 Ariz. 66, 67, 770 P.2d 370, 371
18 (App. 1988). If Citizens is allowed to extend its CC&N (and consequently its service area) to
19 include WhiteStone, Citizens service to DMB's development and its withdrawal of groundwater
20 will be subject to conservation requirements imposed by the Groundwater Management Act and
21 the TMP.

22 Citizens, as a municipal provider, is subject to the Municipal Conservation Program set

23 ⁶ Pursuant to letter agreement with certain representatives of the agricultural sector, ADWR is
24 still operating under the Second Management Plan with respect to that sector.

25 ⁷ The term "service area" is defined by the Groundwater Code as the area in which a city or water
26 company has an operating distribution system, i.e., pipes, mains, and customer meters. A.R.S. §
45-402.31.

1 forth in the TMP. The Municipal Conservation Program's "primary goal" is to assist the Phoenix
2 AMA in moving toward safe yield by: 1) gradually reducing per capita water consumption; 2)
3 encouraging water conservation; and 3) maximizing the efficient use of all water supplies,
4 including effluent. See TMP at 5.1. In addition, DMB must comply with conservation
5 requirements applicable to golf courses under the TMP's Industrial Conservation Program. These
6 requirements limit the areas of turf and the amount of water that may be legally applied to golf
7 courses at WhiteStone.

8 **B. DMB Must Comply with Arizona's Assured Water Supply Program.**

9 In order to offer subdivided lots for sale, DMB must comply with Arizona's AWS
10 Program. The AWS Program requires DMB to demonstrate that it has a 100-year water supply
11 meeting the following criteria: 1) DMB's supply is sufficient to satisfy the needs of a particular
12 phase of development for 100 years; 2) that supply is physically, legally and continuously
13 available; 3) the supply is of adequate quality; 4) DMB's groundwater use is consistent with the
14 goal of the AMA (i.e. safe yield) and with the TMP; and 5) that DMB has the financial ability to
15 construct the needed delivery and treatment systems. See A.R.S. § 45-576.

16 In 1995, ADWR adopted new administrative rules implementing the AWS Program
17 ("AWS Rules"). A.A.C. R12-15-701 – 724. The AWS Rules limit the quantity of mined
18 groundwater that an applicant may use to demonstrate an assured water supply and require new
19 developments to be based predominantly on renewable supplies, such as effluent or Central
20 Arizona Project water. Development, however, is not precluded for entities like DMB, who may
21 rely to some extent on groundwater.

22 If a water provider or a developer has access to groundwater and desires to rely on it to
23 demonstrate a 100-year water supply, the developer may do so, provided it joins the Central
24 Arizona Groundwater Replenishment District ("CAGRD").⁸ CAGRD was created in 1993 by the

25 ⁸ CAGRD replenishment obligations are set forth in A.R.S. §§ 48-3771 through 48-3783.
26 CAGRD's basic obligation is to replenish groundwater in an amount equal to the groundwater
replenishment obligation (i.e. the amount of excess groundwater delivered to member lands for

1 Arizona Legislature to provide landowners, developers and water providers a mechanism to
2 demonstrate an assured water supply under the AWS Rules.⁹ Membership allows an AWS
3 applicant to satisfy that criterion in the AWS Rules requiring the proposed water use be consistent
4 with the water management goal of the particular AMA. After land is enrolled as a member of
5 CAGRD, the landowner pays CAGRD to replenish any groundwater served to the landowner's
6 land that exceeds the limitations imposed by the AWS Rules, i.e., "excess groundwater." The
7 AWS Rules severely limit the amount of groundwater that may be served to subdivided lands
8 within the Phoenix AMA without replenishment. Most of the groundwater served to member
9 lands in the Phoenix AMA will be considered excess groundwater. Thus, CAGRD will be paid
10 to replenish any excess groundwater delivered by Citizens to meet demands at WhiteStone.

11 In addition, DMB plans to enroll all golf courses within WhiteStone as member lands in
12 the CAGRD, thereby subjecting the golf courses to the same replenishment obligation. Therefore,
13 any groundwater used by DMB for the purpose of irrigating golf courses will be replenished by
14 CAGRD just as if it had been used to satisfy residential demand. This represents a significant
15 concession made by DMB in the interest of ensuring that it contributes to achieving safe yield.

16 The decision whether groundwater can or should be used to support additional residential
17 and commercial development (including golf courses) and under what restrictions is, under the
18 law of Arizona, assigned to the Legislature. It is not within the scope of the Commission's
19 jurisdiction. The Commission can require a certificated provider of water service to provide
20 reasonable and adequate service to its customers, and it can require rationing and other
21 restrictions on the provision of water service where necessary to assure adequate service. It

22 _____
23 each AMA within 3 full years of the year in which the obligation is incurred. A.R.S. § 48-
24 3771(A). With respect to the groundwater replenishment obligation attributable to, a particular
25 parcel of member land, CAGRD must replenish that parcel's share of the replenishment
obligation in the AMA where that parcel is located. A.R.S. § 48-3771(B).

26 ⁹ The CAGRD is not a separate legal entity. Rather, it is a function of the Central Arizona Water
Conservation District, which operates the Central Arizona Project system.

1 cannot, however, determine that water service should not be provided to citizens of this state
2 because it concludes that a legally sanctioned use of water is contrary to the state's public policy.
3 The Groundwater Code's conservation requirements and the AWS Program will ensure that water
4 is used at WhiteStone in a manner that is fully consistent with State law and that will provide a
5 water supply sufficient to meet the 100-year demands of each phase of development at
6 WhiteStone. Additional regulation by the Commission is unnecessary.

7 **IV. REGULATION OF LAND USE AND GROWTH IN ARIZONA**

8 The Growing Smarter Act of 1998 and Growing Smarter Plus Act of 2000 gave Arizona
9 cities and towns a number of tools to shape growth in their own communities. See A.R.S. § 9-
10 461.05, et seq. Moreover, it must be emphasized that zoning and land use planning is a
11 legislative function derived from the exercise of the state's police powers. "The general purpose
12 of zoning laws is to promote the general welfare by providing a more stable environment for the
13 orderly development of a community, i.e., a means of strengthening the character of a particular
14 area in terms of its use." Rubi v. 49'er Country Club Estates, Inc., 7 Ariz. App. 408, 411, 440
15 P.2d 44, 47 (1968), citing Weitz v. Davis, 102 Ariz. 40, 424 P.2d 168, 171 (1967). See also
16 Fidelity Nat'l Ins. Co. v. Pima County, 171 Ariz. 427, 430, 831 P.2d 426, 429 (App. 1992)
17 (county board of supervisors "has a statutory duty to exercise its police power for planning and
18 zoning in order to promote the general welfare of the community by providing for orderly
19 development"). "It is well-settled that the enactment of zoning ordinances is a matter reserved to
20 the legislative branch of the government." Mehlhorn v. Pima County, 194 Ariz. 140, 141, 978
21 P.2d 117, 118 (App. 1998). Because zoning and other local land use ordinances constitute a
22 function that is reserved to the legislative branch of the government, the motives of the political
23 entity acting on the application and the reasons for the entity's action are generally not proper
24 subjects for judicial inquiry. Wait v. City of Scottsdale, 127 Ariz. 107, 108, 618 P.2d 601, 602
25 (1980); Mehlhorn, 194 Ariz. at 141-142, 978 P.2d at 118-119; Town of Paradise Valley v. Gulf
26 Leisure Corp., 27 Ariz. App. 600, 605, 557 P.2d 532, 537 (App. 1976).

1 In contrast, the Commission has not been delegated authority over local land use planning
2 or growth management. As explained in Section II, above, the Commission's authority to grant
3 CC&Ns has been delegated to the Commission by the Legislature through the enactment of
4 A.R.S. §§ 40-281 and 40-282. Tonto Creek Estates, 177 Ariz. at 55-56, 864 P.2d at 1087-1088.
5 There is no indication that the Legislature, in authorizing the Commission to issue and extend
6 CC&Ns, intended the Commission to consider issues that are addressed by municipal and county
7 governments as part of their local land planning and zoning process.

8 In contrast, the Legislature has enacted a comprehensive statutory program under which
9 municipalities and counties are to plan for and manage growth. A.R.S. §§ 9-461 – 9-461.12. In
10 summary, these provisions require municipalities to adopt comprehensive, long-range general
11 plans for development within the community. A.R.S. § 9-461.05. These general plans must
12 address a variety of different local land use and growth issues, including the general distribution
13 and location of housing, business, industry, agriculture, recreation, open space and other types of
14 public and private uses of land that are appropriate for the municipality. A.R.S. § 9-461.05(C).
15 Other issues that must be addressed in the plan include open space and environmental planning;
16 transportation; infrastructure expansion, including financing; and water resources, including an
17 analysis of how future growth will be served. A.R.S. § 9-461.05(D). These development plans
18 and their implementation through individual zoning and land use decision-making reflect the
19 particular community's goals and development policies. There is nothing in Title 9 (cities and
20 towns) or in Title 11 (counties) suggesting that the Legislature intended the Commission to play a
21 role in the local planning process in conjunction with issuing or extending CC&Ns.

22 **A. The WhiteStone Project Exemplifies Sound Urban Planning and Growth**
23 **Management.**

24 The WhiteStone project epitomizes a well-designed, master-planned community.
25 WhiteStone is consistent with both the Town's General Plan and the State's goals concerning
26 growth. See Bradley Affidavit at ¶ 12. WhiteStone is intended to be a self-contained community,

1 with a range of housing, commercial uses, employment opportunities, recreational facilities and
2 open space. It is not a case of “urban sprawl” or “leap-frog” development.

3 For example, WhiteStone is located in the Interstate 10 growth corridor. According to the
4 Arizona Department of Economic Security, Research Administration -- Population Statistics Unit,
5 the population of the Maricopa County area is projected to increase approximately 39% between
6 2000 and 2015.¹⁰ DMB’s projections show that during the 2000-2010 period, the West Valley
7 will achieve a 40 percent market share of the Valley-wide new housing demand. See Bradley
8 Affidavit at ¶ 9. This area is undergoing a conversion from agricultural land and, consistent with
9 the changing environment, development of the Caterpillar property converts land that has been
10 altered and is no longer aesthetically pristine into a self-sufficient community.

11 WhiteStone is also planned in a manner that minimizes traffic impacts and resulting
12 pollution. As discussed in the introduction, the community is planned so that schools, health care,
13 work and shopping are close by. The town center is a pedestrian-oriented area where residents
14 will have access to their everyday needs. The development also contains open spaces and hiking
15 paths that help preserve our environment.

16 Additionally, under the agreement between Citizens and DMB governing the extension of
17 water and wastewater service to the WhiteStone project, DMB will construct the initial backbone
18 facilities to serve the development and advance funds for mains and other water and wastewater
19 facilities necessary to serve DMB’s project. Therefore, the development will not create an undue
20 tax burden on the residents of Buckeye or the future ratepayers receiving service from Citizens.

21 In summary, the WhiteStone development is exactly the type of well-planned growth that
22 the recent “Growing Smarter” legislation contemplates. WhiteStone is consistent with the Town's
23 General Plan and promotes the “Growing Smarter” goals of this State. The Commission can and
24 should rest assured that the WhiteStone development is not urban sprawl.

25
26 ¹⁰ See DES Arizona County Population Projections: www.de.state.az.us/links/economic/webpage/popweb/coproj97.xls

1 **V. DMB'S REQUEST FOR SERVICE IS NOT SPECULATIVE; THE NEED FOR**
2 **SERVICE DICTATES THAT A CC&N EXTENSION BE GRANTED.**

3 The Commission may lawfully consider whether there is a need for service in making a
4 decision whether to grant a CC&N. A.R.S. § 40-282(C); see also Arizona Corp. Comm'n v.
5 Hampton, 17 Ariz. App. 291, 497 P.2d 407 (App. 1972). In the case at hand, the evidence
6 overwhelmingly demonstrates that there is a real and present need for water and wastewater
7 utility service to the WhiteStone development.

8 As previously explained, the development process began in November 1999 when the
9 Caterpillar property was annexed and entitled by the Town of Buckeye. See Bradley Affidavit at
10 ¶ 12. That same year, DMB entered into an agreement with the Arizona Department of
11 Transportation requiring DMB to design, fund and construct a traffic interchange on Interstate 10.
12 Construction is scheduled to begin in April 2002. See Bradley Affidavit at ¶ 11.

13 On June 27, 2001, DMB submitted final copies of its Maricopa Association of
14 Governments ("MAG") 208 report to the Maricopa Association of Governments ("MAG"). See
15 Bradley Affidavit at ¶ 15. Section 208 of the Clean Water Act requires regional planning
16 agencies to develop comprehensive water quality management plans. These plans identify
17 existing and proposed wastewater treatment facilities to meet the anticipated municipal and
18 industrial waste treatment needs of an area over a 20-year period, as well as provide general
19 planning guidance for nonpoint source, sludge, stormwater and other activities.

20 DMB's MAG 208 report demonstrates that DMB's planned wastewater treatment system
21 is consistent with the region's MAG 208 Water Quality Management Plan. DMB's MAG 208
22 report has been approved by the Water Quality Advisory Committee, Management Committee,
23 Regional Council and the State Water Quality Management Group. See Bradley Affidavit at
24 ¶ 15. On October 15, 2001, the report was forwarded to the Arizona Department of
25 Environmental Quality ("ADEQ") 208 Planning Department. Id. Upon approval, the Director of
26 ADEQ will send a letter to EPA indicating that the amendment is consistent with State and MAG

1 208 Plans. If EPA does not contact ADEQ within 120 days, ADEQ considers the amendment
2 approved by EPA.

3 DMB began the process of obtaining a permit from the U.S. Army Corps of Engineers
4 ("Corps") under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, in March 2000. Such
5 permit is required in connection with dredge and fill materials that impact waters of the United
6 States. After numerous meetings with the Corps, an application was submitted in November
7 2000. See Bradley Affidavit at ¶ 14. The Corps then requested additional information and a final
8 package of information was submitted by DMB in September 2001. DMB expects the Corps to
9 issue a permit in November.

10 An Application for an Analysis of Assured Water Supply for the WhiteStone
11 Development was submitted to the Arizona Department of Water Resources on January 10, 2001.
12 A Hydrologic Study, prepared by Steve Noel of Southwest Ground-Water Consultants, was
13 submitted with the Analysis Application. The Hydrology Division staff of the Department of
14 Water Resources has reviewed this study and agrees that there is enough groundwater physically
15 available to serve WhiteStone Development. Other requirements, such as water quality and
16 consistency with the management plan have also been approved and DMB expects that an
17 Analysis of Assured Water Supply for WhiteStone will be issued by the Department of Water
18 Resources in the very near future.

19 Most importantly, construction of Phase I utility infrastructure is scheduled to begin in
20 less than six months. Phase I of the WhiteStone development is located at the middle of the
21 planned community allowing the town to start in a core and grow out over time in a concentric
22 fashion like a traditional town. In March 2002 construction of Phase I backbone infrastructure
23 will begin and homes are scheduled to be available in mid to late 2003. Phase I development
24 includes, the freeway interchange, water wells, tanks and offsite water lines, a wastewater
25 treatment plant, a golf course and clubhouse, a community clubhouse, a district park and ten
26 neighborhood parks, a path and trail system, and a main street with 47,000 square feet of retail

1 and office space.

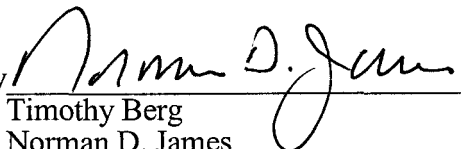
2 In short, the evidence demonstrates that DMB has undertaken significant steps in
3 developing the property, and has already committed thousands of man-hours and millions of
4 dollars to this project. DMB is now ready to begin construction of infrastructure. The project
5 cannot proceed without utility service. A.R.S. § 40-282(C) requires the Commission to grant
6 certificates as "the public convenience and necessity require." Therefore, the public necessity
7 demands that Citizens' CC&Ns be extended at this time.

8 **VI. CONCLUSION.**

9 For the foregoing reasons, DMB respectfully requests that the Commission determine that
10 Citizens is a fit and proper entity to provide public water and wastewater services to the
11 WhiteStone development and authorize Citizens to extend its CC&Ns to provide service to this
12 Project.

13 RESPECTFULLY submitted this 19th day of October, 2001.

14 FENNEMORE CRAIG, P.C.

15
16 By 
17 Timothy Berg
Norman D. James
Attorneys for DMB White Tank LLC

18
19 ORIGINAL and 10 copies filed this
19th day of October, 2001 with

20 Docket Control
21 ARIZONA CORPORATION COMMISSION
1200 West Washington
22 Phoenix, AZ

23 COPY delivered this day to:

24 William A. Mundell, Chairman
ARIZONA CORPORATION COMMISSION
1200 West Washington
25 Phoenix, Arizona 85007

1 Jim Irvin, Commissioner
ARIZONA CORPORATION COMMISSION
2 1200 West Washington
Phoenix, Arizona 85007
3
4 Marc Spitzer, Commissioner
ARIZONA CORPORATION COMMISSION
5 1200 West Washington
Phoenix, Arizona 85007
Hercules Dellas, Aide to
6 William A. Mundell, Chairman
ARIZONA CORPORATION COMMISSION
7 1200 West Washington
Phoenix, Arizona 85007
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9 Patrick Black, Aide to
Jim Irvin, Commissioner
ARIZONA CORPORATION COMMISSION
10 1200 West Washington
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12 Paul Walker, Aide to
Marc Spitzer, Commissioner
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15 Dwight Nodes, Administrative Law Judge
Hearing Division
ARIZONA CORPORATION COMMISSION
16 1200 West Washington Street
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18 Janet Wagner, Counsel
Legal Division
ARIZONA CORPORATION COMMISSION
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21 Steve Olea, Acting Director
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ARIZONA CORPORATION COMMISSION
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24 Jim Fisher
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ARIZONA CORPORATION COMMISSION
25 1200 West Washington Street
Phoenix, Arizona 85007
26 COPY of the foregoing mailed this day to:

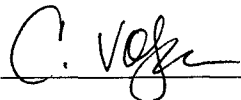
1 COPY of the foregoing mailed this day to:

2 Todd C. Wiley
3 Gallagher & Kennedy
4 2575 East Camelback Road
Phoenix, AZ 85016-9225
Attorneys for Citizens Communications Company

5 Jeff Crockett
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7 One Arizona Center
400 E. Van Buren
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8 Walter W. Meek, President
9 Arizona Utility Investors Association
2100 N. Central Ave., Suite 210
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2828 N. Central Avenue, Suite 1200
Phoenix, AZ 85004

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14 
15 _____

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A

1 FENNEMORE CRAIG
Timothy Berg (No. 004170)
2 Norman D. James (No. 006901)
3003 North Central Avenue
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Phoenix, Arizona 85012-2913
4 Telephone: (602) 916-5000

5 Attorneys for
DMB White Tank, LLC
6
7

8 BEFORE THE ARIZONA CORPORATION COMMISSION

9 IN THE MATTER OF THE
APPLICATION OF CITIZENS
10 COMMUNICATIONS COMPANY,
AGUA FRIA DIVISION FOR (1) AN
11 EXTENSION OF THE AREA
COVERED BY ITS EXISTING
12 CERTIFICATE OF CONVENIENCE
AND NECESSITY, (2) APPROVAL OF
13 THE CATERPILLAR PROPERTY
WATER/WASTEWATER
14 AGREEMENT, (3) APPROVAL OF
THE TARIFF FOR THE WATER
15 FACILITIES HOOK-UP FEE, (4)
APPROVAL OF THE TARIFF FOR
16 GENERAL NON-POTABLE WATER
SERVICE, AND (5) APPROVAL OF
17 RULE NO. 12 APPLICABLE TO NON-
POTABLE WATER SERVICE

DOCKET NO. W-01032B-00-1043

18 IN THE MATTER OF THE
APPLICATION OF CITIZENS WATER
19 SERVICES COMPANY OF ARIZONA
FOR (1) AN EXTENSION OF THE
20 AREA COVERED BY ITS EXISTING
CERTIFICATE OF CONVENIENCE
21 AND NECESSITY FOR
WASTEWATER SERVICE, (2)
22 APPROVAL OF THE CATERPILLAR
PROPERTY WATER/WASTEWATER
23 AGREEMENT, AND (3) APPROVAL
OF THE TARIFF FOR THE
24 WASTEWATER FACILITIES HOOK-
UP FEE.
25

DOCKET NO. SW-03454A-00-1043

AFFIDAVIT OF JOHN L. BRADLEY

1 JOHN L. BRADLEY, being first sworn upon his oath, deposes and says:
2 1. I am over the age of 18 and make this affidavit upon my personal knowledge.
3 2. I am the Vice President of DMB Associates, Inc. I have 11 years experience in
4 real estate development.
5 3. Scottsdale-based DMB Associates, Inc., established in 1984, has extensive
6 experience in both commercial and residential development. Examples of DMB's residential
7 developments include DC Ranch in Scottsdale, Arizona (8,000 acres); Ladera Ranch in Orange
8 County, California (4,000 acres); Power Ranch in Gilbert, Arizona (2,000 acres); Forest
9 Highlands Phase II in Flagstaff, Arizona (500 acres); Lahontan in North Lake Tahoe, California
10 (720 acres); and, the most recent, Santaluz in San Diego, California (4,000 acres). DMB
11 Associates, Inc. has received numerous awards for excellence in the development of master-
12 planned communities specifically including, among others, the 1998 Mame award for Best
13 Master Planned Community from the Homebuilders Association of Central Arizona, the Orchid
14 Award in 1998 for the best residential development from *The Business Journal*; and the Gold
15 Nugget Award in 1998 for the Best Community/Town Site Plan from the Pacific Coast Builders
16 Conference.
17 4. DMB Associates, Inc. is the Manager of DMB Realco LLC, an Arizona limited
18 liability company, which is the sole member and Manager of DMB White Tank, LLC, and
19 Arizona limited liability company.. ("DMB")
20 5. DMB is the developer of the property covered by the joint application of Citizens
21 Communications Company, Agua Fria Division, and Citizens Water Service Company of Arizona
22 (jointly "Citizens") to extend their respective existing Certificates of Convenience and Necessity
23 ("CC&N"). DMB's proposed development is known as Whitestone.
24 6. DMB has requested that Citizens extend water and wastewater utility service to
25 Whitestone, which is contiguous to the existing CC&N of Citizens' Agua Fria Division. Citizens
26 and DMB have negotiated an agreement governing the extension of water and wastewater service

1 to the Whitestone project, under which DMB will construct the initial backbone facilities,
2 including mains, lines, storage facilities, pumping equipment and a wastewater treatment plant, to
3 serve the development. Additionally, DMB will advance funds for mains and other water and
4 wastewater facilities necessary to serve DMB's project.

5 7. Whitestone is an 8,800 acre master plan community located off Interstate 10 in the
6 White Tank Mountains. Approximately 8,635 acres of the property served as the Caterpillar
7 Tractor Proving Grounds (the "Proving Grounds") from the late 1940's until 1988. Caterpillar
8 Inc. used the Proving Grounds to test its earth moving equipment, leaving the property altered
9 and disturbed from years of testing.

10 8. In September 1999, the Caterpillar Foundation and DMB executed a Master
11 Agreement for the sale of the Proving Grounds. The Master Agreement provides for a two
12 beneficiary trust and Trust Agreement under which DMB assumes all rights and obligations for
13 ownership and development of the Proving Grounds and the Foundation is paid a specified
14 percentage of each land sale. The Agreement runs through 2030 with options for extension.

15 9. Whitestone is located in the Interstate 10 growth corridor. Whitestone is
16 approximately 13 square miles in size and is one of the largest single landholdings in Maricopa
17 County. DMB's projections show that during the 2000-2010 period the West Valley will achieve
18 a 40 percent market share of the Valley wide new housing demand.

19 10. The development of Whitestone will occur in several phases over approximately
20 15 years with construction of Phase I scheduled to begin in March 2002. Whitestone is a town
21 within a town and has been designed in a manner consistent with the best traditions of small town
22 planning. The heart of the community will be the mixed-use town center, a pedestrian-oriented
23 central shopping, dining, residential and recreational district. Moving out from the town center
24 the housing plans will relax into suburban style areas that dissolve into an almost rural desert
25 residential area.

26 11. In 1999, DMB acquired 165 acres contiguous to the south boundary of the Proving

1 Grounds which will constitute three of the four corners of a traffic interchange on Interstate 10
2 (the "DMB Property"). Subsequently, DMB entered into an agreement with the Arizona
3 Department of Transportation wherein DMB will design, fund and construct the traffic
4 interchange. The interchange is consistent with the Maricopa County Department of
5 Transportation's Southwest Valley Transportation Study. DMB submitted 30% design to ADOT
6 for review on June 29, 2001 and intends to submit 60% design by November 1, 2001. DMB
7 anticipates initiating construction of the traffic interchange in April 2002.

8 12. The development process began in 1999 when the Proving Grounds and the DMB
9 Property were annexed and entitled by the Town of Buckeye. The November 26, 1999 Pre-
10 Annexation and Development Agreement between DMB and the Town of Buckeye provides for
11 Whitestone to be annexed into the corporate limits of the Town and developed pursuant to the
12 Community Master Plan developed by DMB. The Community Master Plan sets for the land use
13 designations, intensities, provisions for public facilities, design regulations, phasing schedules
14 and procedures for implementation of the project. Specifically, 14,080 residential dwelling units
15 and 4,028,750 square feet of commercial development including employment, retail and
16 industrial space was approved by the Buckeye Town Council in the Community Master Plan.
17 Whitestone is consistent with the Town of Buckeye's General Plan and the State's goals
18 concerning growth.

19 13. In July 1999, DMB's consultant Canyon Research Southwest, issued its
20 Marketability and Fiscal Impact Analysis for the Whitestone project. The analysis concluded that
21 the Whitestone is ideally located for a planned community and that there will be a need for
22 mixed use development in this part of the Phoenix Metropolitan Area.

23 14. In March 2000, DMB began the process of obtaining a Section 404 Clean Water
24 Act permit from the Army Corps of Engineers. Between March 30, 2000 and October 4, 2000
25 DMB met with Corps' staff to discuss the permitting process for Whitestone and provided
26 information to aid the Corps in its jurisdictional delineation. On November 17, 2000, DMB

1 submitted a permit application for Whitestone. The Corps issued public notice of the application
2 on June 1, 2001. In response to the public comments, on September 20, 2001 DMB submitted a
3 final package of information to the Corps consisting of the final mitigation and monitoring plan,
4 proposed permit conditions, proposed deed restriction language and a draft environmental
5 assessment for the Corps' use in finalizing their permit decision. DMB expects that the Corps
6 will make a permit decision in November.

7 15. On June 27, 2001, DMB submitted final copies of its MAG 208 report to the
8 Maricopa Association of Governments. DMB's MAG 208 report has been approved by the
9 Water Quality Advisory Committee, Management Committee, Regional Council and the State
10 Water Quality Management Group. On October 15, 2001, the report was forwarded to the
11 Arizona Department of Environmental Quality ("ADEQ") 208 Planning Department. Upon
12 approval, the Director of ADEQ will send a letter to EPA indicating that the amendment is
13 consistent with State and MAG 208 Plans. If EPA does not contact ADEQ within 120 days,
14 ADEQ considers the amendment approved by EPA.

15 16. On January 10, 2001, DMB submitted an Application for an Analysis of Assured
16 Water Supply for Whitestone to the Arizona Department of Water Resources. A Hydrologic
17 Study, prepared by Steve Noel of Southwest Ground-Water Consultants, was submitted with the
18 Analysis Application. The Hydrology Division staff of the Department of Water Resources has
19 reviewed this study and agrees that there is sufficient groundwater physically available to serve
20 Whitestone. Other requirements, such as water quality and consistency with the management
21 plan have also been approved and DMB expects that the Analysis of Assured Water Supply for
22 Whitestone will be issued by the Department of Water Resources in the very near future.

23 17. DMB is currently negotiating with utility providers including Qwest, Southwest
24 Gas and Arizona Public Service concerning the provision of other utility services to Whitestone.

25 18. Construction of Phase I backbone infrastructure is scheduled to begin in March
26 2002. Phase I backbone infrastructure includes the freeway interchange, water wells, tanks and

1 offsite water lines, a wastewater treatment plant, a golf course and clubhouse, a community
2 clubhouse, a district park and ten neighborhood parks, a path and trail system, and a main street
3 with 47,000 square feet of retail and office space.

4 19. To date, DMB has spent approximately \$16.8 million in furtherance of the
5 Whitestone development.

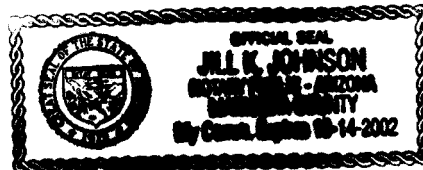
6 20. DMB anticipates that construction of homes will begin in the fourth quarter of
7 2002.

8
9 By: John L. Bradley
John L. Bradley

10 SUBSCRIBED AND SWORN TO before me this day of October, 2001 by JOHN L.
11 BRADLEY.

12
13 Jill K. Johnson
14 NOTARY PUBLIC

15 MY COMMISSION EXPIRES:
16 1234738.1/26043.266



B

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER



BRIAN C. McNEIL
EXECUTIVE SECRETARY

ARIZONA CORPORATION COMMISSION

September 5, 2001

Chairman William Mundell
Commissioner Marc Spitzer
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, Arizona 85007

Re: Water Task Force Report – Docket No. W-00000C-98-0153
Decision No. 62993

Dear Colleagues:

I am in receipt of the Commission Staff's June 29, 2001 Water Task Force (WTF) report on Decision No. 62993, and the direction given by the Commission to develop policy statements for further consideration. I believe that staff has done an excellent job outlining some of the major issues pertinent to water regulation reform. I would like to bring to your attention one particular issue of importance which directly impacts a Commission policy goal of water industry consolidation – the use of acquisition adjustments.

Originally developed to encourage the consolidation of small and/or non-viable water systems into larger, more efficient ones, the acquisition adjustment is seen as a regulatory tool to encourage larger companies to generate greater 'economies of scale' by acquiring smaller, less efficient systems. In its June 29, 2001 report, Staff listed six conditions that a water company must prove by a preponderance of the evidence in order to obtain an acquisition adjustment or rate of return premium. However, I believe that one such condition – that the acquired company be limited to a class D or E utility – will be ineffective in encouraging regional consolidation where no class D or E utilities exist. Alternatively, it will take away an incentive for two class C water systems to merge.

Provided that the other five conditions proposed by staff are adequate enough to protect the public against an abuse of these regulatory incentives (acquisition adjustments and rate of return premiums), the Commission should be expanding opportunities for water systems in Arizona to consolidate, regardless of size. In the next 20 years, private water companies around the nation will face a daunting task; they must comply with increasingly stringent federal regulations (i.e. arsenic levels), mandates of the Safe Drinking Water Act ("SDWA"), and improve or replace a rapidly aging infrastructure. Unlike recent trends in deregulating telecommunications and electricity, the traditional economic principles which gave way to monopolies still apply in the water industry.

September 5, 2001

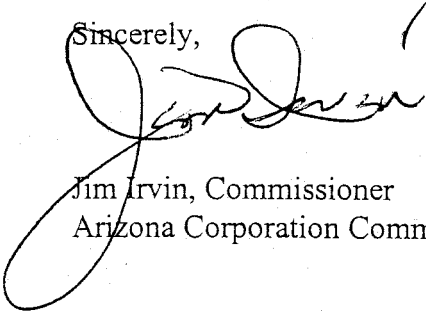
Page 2

While I understand that the Commission has broad discretion to implement policy considerations within the body of its Decisions, it is important that such policies remain flexible in trying to achieve a desired result -- which in this case, is water industry consolidation. For instance, if a class A water company seeks an acquisition adjustment or rate of return premium for acquiring a class C system, it will still have to meet the other conditions recommended by staff; there will be no negative impact to the viability of the acquiring company; acquired system's customers will receive improved service; the purchase price must be fair and reasonable, conducted at arms-length, and the acquisition must be in the public interest. If the Commission establishes a policy limiting acquisition adjustments to only those instances where the acquired company is a class D or E company, medium to larger companies may be less willing to consolidate amongst themselves.

Much will depend on how the Commission ultimately decides to implement the policy goals and regulatory reforms contained in the WTF report. We may seek to give our Utilities Division staff a general policy outline to follow when considering requests for acquisition adjustments and rate of return premiums, instead of formally codifying such policy in our administrative rules. Some policies may need statutory change and the development of a legislative agenda. Nevertheless, I look forward to our discussion on water issues as a whole, and what role the Arizona Corporation Commission can take in helping to address consumers' needs today, and into the future.

Thank you for your time and consideration in this matter.

Sincerely,



Jim Irvin, Commissioner
Arizona Corporation Commission

Cc: Docket Control